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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 CHRIS MELINGONIS, individually and on  
12 behalf of all others similarly situated,  
13  
14 Plaintiffs,

15 vs.

16 NETWORK COMMUNICATIONS  
17 INTERNATIONAL CORP., D/B/A/ 1-800-  
18 CALL-4-LESS,

Defendant.

CASE NO. 10 CV 1364 MMA (NLS)

**NOTICE AND ORDER  
PROVIDING TENTATIVE  
RULINGS RE:**

**DEFENDANT'S MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT WITH PREJUDICE,  
AND ACCOMPANYING  
REQUESTS FOR JUDICIAL  
NOTICE**

[Doc. No. 11]

19 Currently pending before the Court, and set for hearing on Tuesday, November 30, 2010 is  
20 Defendant Network Communications International Corp.'s (doing business as 1-800-CALL-4-  
21 LESS) motion to dismiss Plaintiff Chris Melingonis' first amended complaint with prejudice for  
22 failure to state a claim upon which relief may be granted, and its accompanying request for judicial  
23 notice. Defendant also submitted a second request for judicial notice in support of its reply brief.  
24 Having considered the parties' submissions, and in anticipation of Tuesday's hearing, the Court  
25 issues the following tentative rulings:

26 (1) The Court tentatively **GRANTS** Defendant's requests for judicial notice.  
27 Defendant requests the Court take judicial notice of various documents regarding the legislative  
28 history of 47 U.S.C. § 227 and 47 U.S.C. § 226. Although the Ninth Circuit has recently held

1 judicial notice of these types of legislative material is unnecessary (*Von Saher v. Norton Simon*  
 2 *Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)), California district courts routinely  
 3 take judicial notice of such materials. *See, e.g., Marilao v. McDonald's Corp.*, 632 F. Supp. 2d  
 4 1008, 1011 (S.D. Cal. 2009); *Rocky Mtn. Farmers Union v. Goldstene*, 2010 U.S. Dist. LEXIS  
 5 59758 \*38-43 (E.D. Cal.); *Stemplewski v. Suntrust Mortgage Inc.*, 2010 U.S. Dist. LEXIS \*3  
 6 (N.D. Cal.). Further, Plaintiff does not appear to oppose Defendant's requests for judicial notice.

7 (2) The Court tentatively **DENIES** Defendant's motion to dismiss. Defendant argues  
 8 Plaintiff cannot state a viable claim under the Telephone Consumer Protection Act ("TCPA") (42  
 9 U.S.C. § 227) and his First Amended Complaint ("FAC") should be dismissed with prejudice  
 10 because: (1) Congress did not intend the TCPA to regulate operator services relating to collect  
 11 calls, such as those provided by Defendant; (2) Defendant, as an operator service who merely  
 12 attempts to connect a call at the request of an initiating party and arrange for payment of the costs  
 13 associated with the call, does not "make" or "initiate" a "call" within the meaning of the TCPA;  
 14 and (3) Defendant's automated disclosure at the beginning of the call identifying itself cannot be  
 15 grounds for liability under the TCPA because Defendant is required by federal law (42 U.S.C. §  
 16 226) to provide such information.

17 First, although the legislative history does not expressly state that Congress intended the  
 18 TCPA to regulate operator services, such as those provided by Defendant, the TCPA is  
 19 intentionally broad. Where exceptions to the TCPA are deemed necessary for certain types of  
 20 calls, the FCC has the authority to create them. 42 U.S.C. § 227(b)(2). Indeed, the FCC has  
 21 stated, "[w]e also reiterate that the plain language of section 227(b)(1)(A)(iii) prohibits the use of  
 22 autodialers to make any call to a wireless number in the absence of an emergency or the prior  
 23 express consent of the called party. **We note that this prohibition applies regardless of the**  
 24 **content of the call, and is not limited only to calls that constitute 'telephone solicitations.'**" *In*  
 25 *re the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of*  
 26 *1991*, 23 F.C.C.R. 559, 565 (Jan. 4, 2008) (emphasis added). Defendant does not assert an  
 27 exemption exists for operator services, rather, Defendant's argument focuses on the assumption  
 28 that the TCPA does not apply to Defendant in the first instance. Given the intentionally broad

1 scope of the TCPA, and the absence of a rule or order exempting Defendant's services from  
2 compliance with its restrictions, it appears dismissal of the FAC on this ground is inappropriate.  
3 The existence of 42 U.S.C. § 226, and Congress' awareness of operator services similar to those  
4 provided by Defendant when amending section 227, do not warrant a different result at this stage.

5 Second, the Court disagrees that Defendant does not "make" or "initiate" a "call" within  
6 the meaning of the TCPA. Defendant correctly points out that the TCPA does not define "make,"  
7 "initiate," or "call" as used in the statute, but the Ninth Circuit has recently defined "call" as it  
8 applies to the TCPA, as "to communicate with or try to get into communication with a person by  
9 telephone." *Scatterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). Based on  
10 the factual allegations in the FAC, which at this stage the Court accepts as true,<sup>1</sup> as well as the  
11 intentionally broad scope of the TCPA, it appears Defendant's alleged contact with Plaintiff  
12 constitutes a "call" as defined by the Ninth Circuit. Even if Defendant called Plaintiff at the  
13 initiating party's request, Defendant allegedly placed an independent call to Plaintiff to try to get  
14 in communication with him to solicit permission to connect the initiating party's call for a fee.  
15 [Doc. No. 7, ¶6.] Defendant's argument that its service is merely a conduit for carrying out the  
16 initiating party's desire to speak with Plaintiff is unavailing. Thus, dismissal on this ground would  
17 not be proper.

18 Third, the Court is tentatively unpersuaded by Defendant's argument that its purported  
19 obligation to comply with the Telephone Operator Consumer Services Improvement Act  
20 ("TOCSIA"), 42 U.S.C. § 226, immunizes it against the alleged violations of the TCPA, 42 U.S.C.  
21 § 227. Based on the existing allegations in the FAC, the Court is not convinced that section 226  
22 applies to the facts of this case, nor that reading section 226 in connection with section 227 would  
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27 <sup>1</sup> The Court reviews the contents of the complaint, accepting all factual allegations as true, and  
28 drawing all reasonable inferences in favor of the nonmoving party. *Knivel v. ESPN*, 393 F.3d 1068,  
1072 (9th Cir. 2005). Notwithstanding this deference, the reviewing court need not accept "legal  
conclusions" as true. *Ashcroft v. Iqbal*, -- U.S. --, 129 S. Ct. 1937, 1949 (2009).

1 exempt Defendant from liability for the conduct alleged. Therefore, it appears judgment in  
2 Defendant's favor at this stage is not appropriate.

3 **IT IS SO ORDERED.**

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5 DATED: November 29, 2010

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7 Hon. Michael M. Anello  
8 United States District Judge  
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